

**Mrs. Baird's Bakeries, Inc. and Teamsters Local  
and Loyd E. Bradford. Case 16-RD-1383**

April 30, 1997

**SUPPLEMENTAL DECISION, DIRECTION,  
AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS FOX  
AND HIGGINS

The National Labor Relations Board has considered a determinative challenge in an election held on June 7, 1996, and the hearing officer's supplemental report recommending disposition of it.<sup>1</sup> The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows seven for and six votes against the Union, with one challenged ballot.

The hearing officer found that the Employer permanently transferred Guadalupe Roman Mireles to a non-bargaining unit loader position prior to the June 7, 1996 election, and that Mireles did not have a reasonable expectancy of recall to his former bargaining unit position as a transport driver. He thus concluded that Mireles was not an eligible voter. We disagree.

The record evidence reveals<sup>2</sup> that the Employer transferred Mireles from his position as a transport driver to a nonunit position in shipping as a loader in January 1996. Mireles testified that at this time his supervisor, Tommy Skrobanek, told him that the transfer was temporary pending the hearing on his "driving while intoxicated (DWI)" charge.<sup>3</sup> Ron White, the Employer's general manager, testified that he discussed the issue with Skrobanek prior to Skrobanek's notifying Mireles and that the decision was made "[t]o take [Mireles] out of the driving position and moving [sic] him into a shipping position where he would not be driving one of our Company vehicles until this DWI charge was resolved." Mireles continued to wear his transport driver's uniform, to receive his transport driver's pay,<sup>4</sup> and to be listed with transport drivers on the

Employer's seniority lists.<sup>5</sup> Moreover, the Employer included Mireles in its next annual check with the Department of Public Safety concerning its drivers' records.<sup>6</sup> Furthermore, both White and Mike Stewart, the Employer's corporate vice president for human resources, testified that the Employer had a past practice, with at least two other drivers with pending DWI charges, of transferring them temporarily to nondriving positions until their charges were adjudicated.<sup>7</sup>

Accordingly, we find that the record, taken as a whole,<sup>8</sup> warrants a finding that Mireles had a reasonable expectation of returning to his position as a transport driver and that his loading position was temporary.<sup>9</sup> We therefore overrule the challenge to Mireles' ballot and direct that it be opened and counted.

ing loading work. This fact, together with the others discussed here, indicates that the Employer's transfer of Mireles to shipping was temporary and not permanent.

<sup>5</sup> We find irrelevant Mireles' lack of knowledge, at the time of the transfer, that he would remain on the seniority list of the transport drivers. What is critical to our inquiry is the uncontroverted evidence that Mireles remained on this list.

<sup>6</sup> The Employer obtains up-to-date 3-year driving records from the Department of Public Safety in March. The Employer included Mireles with all its other transport drivers in its March 1996 request. General Manager White testified that "we still considered Mr. Mireles to be a driver."

<sup>7</sup> We disagree with the hearing officer's finding that the Employer's past practice is distinguishable. The hearing officer noted that these nonbargaining unit employees drove cars or vans requiring regular operator licenses, unlike Mireles, who drove a truck requiring a commercial license governed by Department of Transportation guidelines, and that there was no record of a "change of status" form for these employees, as there was for Mireles. These factors cited by the hearing officer do not undermine the uncontroverted evidence that the Employer has temporarily transferred employees from driving positions to nondriving positions pending resolution of outstanding DWI charges, irrespective of license or vehicle or whether the employees might still lawfully drive.

<sup>8</sup> We disagree with the hearing officer's analysis of the Employer's "change of status" form for Mireles and the evidence concerning the Employer's hiring of other drivers after it transferred Mireles. We find that both of these circumstances are insufficient to outweigh the other evidence recited herein. We also find distinguishable *National Container Corp.*, 99 NLRB 1492, 1495-1496 (Arthur Fraske, Lawrence Anderson) (1952), the case cited by the hearing officer in drawing his conclusion that the Employer permanently transferred Mireles. In *National Container Corp.*, no party contested the permanent transfer of either Fraske or Anderson to positions outside the unit before the election. By contrast, the Employer and Mireles asserted that the transfer here was temporary rather than permanent from the outset.

<sup>9</sup> Mireles was not in the position of an employee whose change of status is open ended with no reasonable expectancy of return to the former status. See *Sid Eland, Inc.*, 261 NLRB 11 (1982) (employee on leave of absence in order to take care of family business with no indication of when or if he would return to work has no reasonable expectation of return to work). See also *Vincent M. Ippolito, Inc.*, 313 NLRB 715, 719 (1994).

<sup>1</sup> On November 14, 1996, the Board remanded this case to the Regional Director.

<sup>2</sup> We note that the hearing officer discussed the testimony of the Employer's witnesses at the hearing and impliedly credited almost all of it. Thus the Employer's testimony stands largely uncontroverted, and it is well established that the Board may rely on such testimony. See *BMC America*, 304 NLRB 362 fn. 1 (1991), and cases cited there.

<sup>3</sup> Mireles was arrested for this DWI offense in February or March 1995. He informed Skrobanek immediately and Skrobanek informed Ron White, the Employer's general manager. At this time, the Employer allowed Mireles to continue to drive because there was no legal impediment to this activity and because the case was expected to be adjudicated within 2 or 3 months. Moreover, Mireles committed the offense when he was off duty in his personal vehicle and Mireles' lawyer anticipated that Mireles would be acquitted.

<sup>4</sup> We disagree with the hearing officer's conclusion that this fact is unimportant because Mireles' pay rate was only 14 cents higher than the highest pay for loaders in the shipping department. The Employer paid Mireles more than it paid any other loader for perform-

## DIRECTION

IT IS DIRECTED that the Regional Director shall, within 14 days from the date of this Supplemental Decision, Direction, and Order, open and count the ballot of Guadalupe Roman Mireles, and prepare and serve on the parties a revised tally of ballots. Thereafter, the

Regional Director shall issue the appropriate certification.

## ORDER

IT IS ORDERED that the matter is referred to the Regional Director for Region 16 for further processing consistent with this Supplemental Decision, Direction, and Order.